



BRIEFING: SEPTEMBER 10, 2013, BOARD MEETING AGENDA ITEM #6

TO: Chairman Richard and Board Members

FROM: Frank Vacca, Chief Program Engineer
Karen Greene Ross, Assistant Chief Counsel

DATE: September 10, 2013

RE: Request for Delegation of Authority to CEO to Execute Agreements with Union Pacific Railroad (UPRR) for Engineering, Construction and Maintenance (EC & M) and for related Indemnification and Insurance (I & I) terms.

BACKGROUND

The Authority's first Construction Package (CP 1), which covers the area from Madera Acres at Average 17 to at East American Average, just south of the City of Fresno, is adjacent to the UPRR for approximately 29 miles. At no point in time will high-speed rail share passenger tracks with UPRR, but it will go over and, in some areas be in extremely close proximity to their right of way.

UPRR's cooperation and accommodation is crucial to successful delivery of CP 1 and the high-speed rail program is dependent on UPRR providing:

- (1) Permission to enter to assess potential environmental risks during construction and for appraisal of parcels¹ to be acquired;
- (2) Safe access to their right of way for construction;
- (3) Temporary relocation of their tracks and temporary changes to signal/communication systems;
- (4) Approval of key Project design features, including overpasses and intrusion protection barriers (collectively referred to as "mutual benefit improvements");
- (5) Continuous and safe operation of freight service during and after construction

The UPRR is a publicly traded corporation whose priority is to preserve and protect their ability to move freight through their systems in order to serve future and current customers.

¹ Approximately 31 parcels will be acquired from UP for CP 1.

Authority staff negotiated the terms and conditions of UPRR's cooperation and accommodation for the Authority's construction needs primarily for CP 1, which was preceded by a June 11, 2012 Memorandum of Understanding (MOU) between the parties. A separate Reimbursement Agreement was executed with UPRR on June 4, 2012 to permit reimbursement for expenses incurred in reviewing and commenting on the Authority's Plans and Designs, participation in coordination meetings with other passenger rail agencies, and funding for the Authority's share of network modeling work being performed by the UPRR. The final terms of the Engineering, Construction and Maintenance Agreement (EC & M) have been resolved, allowing the Board to approve its execution.

The Authority is seeking Board approval to delegate authority to the CEO to execute² these agreements both of which are crucial to the Design Build (DB) contract and successful delivery of the Project.

A. The Engineering , Construction and Maintenance Agreement

Under the pending EC & M agreement, the Authority has agreed to construct Intrusion Protection barriers whenever the high-speed rail (HSR) mainline tracks are within 102 feet of the edge of the UPRR's right of way. This provision will help assure that freight trains and their loads do not impact the HSR mainline tracks thereby preventing potential safety hazards.

(1) UPRR will be responsible for the design standards, review, comment, and approval of all plans and designs proposed by the Design Builder (DB) for all project elements for CP 1 that are on UP property or within 102 feet of the UP property line. The DB is ultimately responsible for compliance with not only UPRR's design standards but for the Authority's HSR Design Criteria and for meeting the American Railroad Engineering Maintenance Association (AREMA) Standards as well. This additional level of review by the UP will further insure that all project elements adjacent to the UPRR are properly designed and in full compliance with UPRR's design standards.

(2) UP will be responsible for supplying flagging crews where required by UP operating practices to protect rail road operations and right of way during both pre construction activities (i.e. surveying, appraisals, testing) and construction. Safe access will require the Authority to request, pay for, and have UP schedule RR employees as flaggers. Construction can be greatly impacted if flaggers are not readily available. Thus, a flagging pool will be created by UP for the duration of CP 1 to assure that the Design Builder is not delayed due to the lack of flagging resources. The number of flaggers required to complete all work adjacent to the UPRR right of way is currently estimated at 38 individuals. This number will be adjusted based upon the review of the Design Builder detail schedule.

² Public Utility Code Section 185036 allows the Authority to enter into contracts with private entities for the design and construction of high speed train facilities.

(3) UPRR will be responsible for construction of only a portion of the shoofly (bypass track) required to facilitate the construction of underpasses (i.e. under the HSR and UPRR tracks) at Ventura Street and Tulare Street. UPRR will be specifically responsible for the installation of the turnouts and track to the clear point, design and cutover of the signal and communication systems and the restoration of the UPRR main line track upon completion of the overpasses and replacement of any UPRR track sections that may be damaged during the construction.

In separate agreements, which are not being presented to the Board today (and are not a part of this Delegation request), UPRR will provide a variety of property rights, including temporary construction easements, permanent easements and full ownership, through separate Purchase and Sale Agreements to be approved by the state's Public Works Board. In addition, there will be a series of separate Over Pass Agreements between UPRR and the Authority where local roads or highway or the HSR alignment goes over the UP right of way. Over Pass Agreements involving construction of new or changes to existing at grade crossings will require the approval of the California Public Utility Commission.

B. The Indemnity and Insurance Requirements

Unlike the many intercity and commuter passenger rail services with which the freights have negotiated indemnification agreements, the Authority will not be sharing its dedicated tracks or right of way with the freight railroads. The Project's safety design requirements include staying at least 102 feet away from the edge of the freights existing right of way (except for overpasses/viaducts). Where the edge of the HSR main line tracks are within 102 feet of UPRR right of way, Intrusion Protection Barriers will be constructed after UPRR has approved all levels of design for these barriers. Nonetheless, UPRR perceives the Authority's Project as exposing them to new and potentially substantial risk. Therefore, one of their conditions for accommodating the Project is a contractual assumption by the Authority through the I & I of some of this risk.

The federal Amtrak Reform and Accountability Act (Amtrak Act) explicitly authorizes passenger rail providers, including the Authority, to enter into indemnification agreements to allocate financial responsibility for claims. The terms of the I & I are based on existing state and federal laws, including the Amtrak Act which specifically addresses commercial passenger liability. The Act specifically preempts any other statutory, common law or public policy claims and is applicable regardless of the nature of the conduct giving rise to the damages or liability. The Amtrak Act imposes a statutory liability cap (\$200 million on aggregate damages from a single incident) which was set by Congress to keep train systems such as Amtrak operating when faced with major lawsuits. The I & I includes commercially reasonable insurance requirements consistent with these limits.³

³ The I & I insurance amounts are an industry standard, will be passed through to the Design Build contractor in CP1 and were included in their bid. Insurance covering liability risks for operations commencing in 2018 is not readily available for purchase in today's market. However, because the insurance terms for operations are currently commercially reasonable and consistent with federal law limits, the Authority agreed to procure this insurance prior to commencement of operations.

None of California's other passenger rail operators' risk allocation parameters are comparable to this Project as they either (1) operate over freight owned infrastructure under the Amtrak umbrella and benefit from STB's oversight of risk allocation (statutorily authorized for Amtrak only) and are insured under Amtrak's national insurance program⁴ or (2) the freights have operating rights over a publicly owned corridor and the indemnification relationships were determined prior to today's heightened concerns over liability risks.

The Authority will still be responsible for losses in excess of negotiated policy limits and coverage restrictions. There are situations where despite contractually agreed to Insurance requirements, insurance companies won't agree to cover everything (or will specifically exclude coverage through endorsements, exclusions or otherwise). Thus, insurance will not be sufficient to make the freights completely whole to the extent insurance can't meet their indemnification requirements. In addition, the Authority will have risk exposure for coverage of indemnification for operations above and beyond the Amtrak Act cap limits, such as for third party claims and operations. However, these risks can likely be mitigated before initiation of HSR service through insurance options like Owner Controlled Insurance programs or passenger rail insurance pools⁵.

Recommendation

Approve the proposed resolution delegating authority to the Chief Executive Officer or a designee of the CEO, to execute a Construction, Engineering and Maintenance and related Insurance and Indemnification agreements with the Union Pacific Railroad. Upon execution, these agreements will be set up as a five year reimbursement agreement for payment of all actual and eligible costs incurred by UPPR in an amount not to exceed \$39,400,000. This amount is the estimated cost of (1) a scheduled and dedicated flagging crew through construction, (2) materials and construction work done by UPPR for temporary track relocation and signal/communication modifications and (3) the development of design standards and compliance review of Design builders' designs for all mutual benefit improvements.

Attachments

– Resolution #HSRA 13-24

⁵ Caltrans contracts for Amtrak services on tracks owned by the freights. Caltrans supports Amtrak service through an annual operating agreement. Amtrak has a nationwide insurance policy that includes coverage for Caltrans' Division of Rail services; Caltrans reimburses Amtrak annually.